STATE OF MICHIGAN

COURT OF APPEALS

RICHARD A. RODGERS, Plaintiff-Appellant, v NORTH AMERICAN INSURANCE COMPANY, Defendant-Appellee.	UNPUBLISHED July 19, 2005 No. 251926 Ingham Circuit Court LC No. 02-002052-CK

Before: Bandstra, P.J. and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant under MCR 2.116(C)(10) and (I)(1) in this disability insurance coverage dispute. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the nonmoving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31.

Summary disposition under MCR 2.116(I)(1) is proper "'[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact . . . .'" *Ford Motor Co v Bruce Twp*, 264 Mich App 1, 15; 689 NW2d 764 (2004), quoting MCR 2.116(I)(1).

The interpretation of an insurance contract is a question of law that is also reviewed de novo on appeal. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004).

This Court interprets insurance contracts like it does other contracts and looks to the language of the policy in interpreting its terms under the well-established principles of contract interpretation. *Singer v American States Ins (After Remand)*, 245 Mich App 370, 374; 631 NW2d 34 (2001). The language of an insurance contract should be afforded its plain and ordinary meaning. *Id*. Language is clear if it "fairly admits of but one interpretation." *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003). An insurance contract is ambiguous if its language can be reasonably understood to have different meanings. *Id*.

The trial court properly granted summary disposition to defendant on plaintiff's breach of contract claim. Question #2 on the application for disability insurance asked whether the applicant, within the previous two years, had been diagnosed or treated for "any condition/disease/disorder of the bones . . . ." After completing the application and filing a claim for benefits, plaintiff admitted that he was treated for a bone spur on his left heel bone in February 2001, less than two years before he applied for disability insurance with defendant. The plain and ordinary definition of "spur" relevant to this case is "an abnormal bony growth or projection." *Random House Webster's College Dictionary* (1997). Moreover, the application defined "disease/disorder" as "[a] chronic or persistent condition that has been diagnosed or treated which causes unnatural, irregular impairment or weakening of normal functioning." According to plaintiff's medical records, his bone spur was a chronic and persistent condition. Thus, it constituted "any condition/disease/disorder of the bones" within the plain and ordinary meaning of that phrase. In addition, plaintiff admitted at his deposition that he had been treated for one of the conditions listed in the "Evidence of Insurability" section of the application within two years before filling out the application. Thus, plaintiff admitted that his response to at least one of the questions in that section was untrue.

In addition to the bone spur, plaintiff was diagnosed with osteoarthritis in January 2000. "Osteoarthritis" is defined as "arthritis marked by chronic breakdown of cartilage in the joints leading to pain, stiffness, and swelling." *Random House Webster's College Dictionary* (1997). Thus, osteoarthritis is a "condition/disease/disorder of the . . . joints" as stated in question #2 of the insurance application. Because plaintiff was diagnosed with osteoarthritis less than two years before he applied for disability insurance, plaintiff's negative response to question #2 was untrue.

Because of plaintiff's untruthful response, defendant was justified in rescinding the insurance policy. MCL 500.2218 provides, in relevant part:

> The falsity of any statement in the application for any disability insurance policy covered by chapter 34 of this code may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer.
>
> (1) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract.

As our Supreme Court recognized:

> "Acceptance of the risk refers to the time of making of the contract of insurance and to the insurance concept of risk. Whether an insurer determines to enter into a contract is affected by its assessment of the likelihood of a fact

> increasing the chances of the loss insured against." [*Smith v Globe Life Ins Co*, 460 Mich 446, 459; 597 NW2d 28 (1999), quoting *In re Certified Question, Wickersham v John Hancock Mut Life Ins Co*, 413 Mich 57, 63; 318 NW2d 456 (1982).]

It is clear that plaintiff's misrepresentation affected defendant's "acceptance of the risk" because defendant would not have provided disability coverage if plaintiff had answered "yes" to question #2. Directly under that question, the application states, "I understand that if I answer 'YES' to question #2, above, I have no 'Disability coverage' or 'Total and Permanent Disability coverage.'" In addition, defendant's supervisor of credit administration stated in an affidavit that if an applicant answers "yes" to question #2, the applicant is not eligible for disability insurance coverage and the application is automatically rejected. Because defendant relied on plaintiff's misrepresentation and plaintiff's application would have been rejected had he answered question #2 truthfully, MCL 500.2218 allowed defendant to void the contract. See *Smith*, *supra* at 459-461. Thus, the trial court properly granted defendant's motion for summary disposition on plaintiff's breach of contract claim.

The trial court also properly granted summary disposition to defendant on plaintiff's Michigan Consumer Protection Act (MCPA) claim. Although MCL 445.904(2) formerly authorized parties to pursue MCPA claims against insurance companies under MCL 445.911, see *Smith*, *supra* at 467-468, the Legislature subsequently amended MCL 445.904 through 2000 PA 432, eliminating the ability to bring a MCPA claim against an insurance company under MCL 445.911. MCL 445.904(3) now provides:

> This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by chapter 20 of the insurance code of 1956, 1956 PA 218, MCL 500.2001 to 500.2093.

Accordingly, the trial court properly dismissed plaintiff's MCPA claim.

We decline to award defendant costs and attorney fees as defendant requests. Although it is questionable whether plaintiff had any reasonable belief that he presented a meritorious issue on appeal, defendant failed to properly present its request in the form of a motion as required under MCR 7.211(C)(8). We decline to grant defendant the requested relief on this Court's own initiative as permitted under MCR 7.216(C)(1).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter